

SEP 4 - 2007

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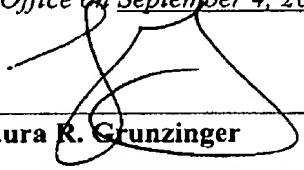
**FROM: Laura R. Grunzinger**

Fax No. 513-627-8118 Phone No. 513-627-4597

Application No. : 09/909,288  
Inventor(s) : Peter Robert Foley *et al.*  
Filed : 7/19/2001  
Art Unit : 1751  
Examiner : G.R. Delcotto  
Docket No. : CM2506  
Confirmation No. : 2173  
Customer No. : 27752

**FACSIMILE TRANSMITTAL SHEET AND**  
**CERTIFICATE OF TRANSMISSION UNDER 37 C.F.R. §1.8**

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**Laura R. Grunzinger**

(Signature)

Listed below are the item(s) being submitted with this Certificate of Transmission:\*\*

- 1) Appeal Brief - 10 Pages
- 2) Fee Transmittal - 1 Page

Number of Pages Including this Page: 18

Based on Form PTO/SB/17 (Rev. 07/07; Approved for use through 06/30/2010); Modified for P&G Use 07/07  
U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

<b>FEE TRANSMITTAL</b> <b>for FY 2007</b> Patent fees are subject to annual revision. Effective December 8, 2004	<b>Complete If Known</b>	
	Application Number	09/909,288
	Confirmation Number	2173
	Filing Date	July 19, 2001
	First Named Inventor	Peter Robert Foley et al
	Examiner Name	G. R. Delcotto
	Art Unit	1751
<b>TOTAL AMOUNT OF PAYMENT \$500</b>		Docket No. CM2506

<b>METHOD OF PAYMENT</b>		<b>FEE CALCULATION (continued)</b>																																														
1. <input checked="" type="checkbox"/> The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to: Deposit Account Number: 16-2480 Deposit Account Name: The Procter & Gamble Company		5. <b>ADDITIONAL FEES</b> <table border="1"> <thead> <tr> <th>Fee Description</th> <th>Fee</th> <th>Paid</th> </tr> </thead> <tbody> <tr> <td>Extension for reply within 1<sup>st</sup> month</td> <td>(\$120)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 2<sup>nd</sup> month</td> <td>(\$450)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 3<sup>rd</sup> month</td> <td>(\$1,020)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 4<sup>th</sup> month</td> <td>(\$1,590)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Extension for reply within 5<sup>th</sup> month</td> <td>(\$2,160)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Information Disclosure Statement fee</td> <td>(\$180)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>37 CFR 1.17 (q) Surcharge - Late provisional filing fee or cover sheet</td> <td>(\$50)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Non-English specification</td> <td>(\$130)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Notice of Appeal</td> <td>(\$500)</td> <td><input checked="" type="checkbox"/></td> </tr> <tr> <td>Filing a brief in support of an appeal</td> <td>(\$500)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Request for oral hearing</td> <td>(\$1,000)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)</td> <td>(\$1,370)</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Other:</td> <td></td> <td><input type="checkbox"/></td> </tr> </tbody> </table>		Fee Description	Fee	Paid	Extension for reply within 1 <sup>st</sup> month	(\$120)	<input type="checkbox"/>	Extension for reply within 2 <sup>nd</sup> month	(\$450)	<input type="checkbox"/>	Extension for reply within 3 <sup>rd</sup> month	(\$1,020)	<input type="checkbox"/>	Extension for reply within 4 <sup>th</sup> month	(\$1,590)	<input type="checkbox"/>	Extension for reply within 5 <sup>th</sup> month	(\$2,160)	<input type="checkbox"/>	Information Disclosure Statement fee	(\$180)	<input type="checkbox"/>	37 CFR 1.16(f) Late Oath/Declaration (nonprovisional)	(\$130)	<input type="checkbox"/>	37 CFR 1.17 (q) Surcharge - Late provisional filing fee or cover sheet	(\$50)	<input type="checkbox"/>	Non-English specification	(\$130)	<input type="checkbox"/>	Notice of Appeal	(\$500)	<input checked="" type="checkbox"/>	Filing a brief in support of an appeal	(\$500)	<input type="checkbox"/>	Request for oral hearing	(\$1,000)	<input type="checkbox"/>	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	(\$1,370)	<input type="checkbox"/>	Other:		<input type="checkbox"/>
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3. <b>APPLICATION SIZE FEE:</b> Sheets of Spec and Drawings <input type="checkbox"/> (\$250 for each 50 sheets in excess of 100, except for sequence and program listings) SUBTOTAL (2)+(3) (\$) <input type="checkbox"/>																																																
4. <b>EXTRA CLAIM FEES FOR UTILITY AND REISSUE:</b> <table border="1"> <thead> <tr> <th></th> <th>Extra Claims</th> <th>Fee from Below</th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr> <td>Total Claims <input type="checkbox"/> - 20** = <input type="checkbox"/> x</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Independent Claims <input type="checkbox"/> - 3** = <input type="checkbox"/> x</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> <tr> <td>Multiple Dependent claims:</td> <td><input type="checkbox"/></td> <td>=</td> <td><input type="checkbox"/></td> </tr> </tbody> </table> ** or number previously paid, if greater; For Reissues, see below <b>Fee Description</b> Claims in excess of 20 (\$50 per claim) Independent claims in excess of 3 (\$200 per claim) Multiple dependent claim, if not paid (\$360) **Reissue: each independent claim over 3 and more than in the original patent (\$200 per claim) **Reissue claims: each claim over 20 and more than original patent (\$50 per claim) SUBTOTAL (4) (\$) <input type="checkbox"/>			Extra Claims	Fee from Below	Fee Paid	Total Claims <input type="checkbox"/> - 20** = <input type="checkbox"/> x	<input type="checkbox"/>	=	<input type="checkbox"/>	Independent Claims <input type="checkbox"/> - 3** = <input type="checkbox"/> x	<input type="checkbox"/>	=	<input type="checkbox"/>	Multiple Dependent claims:	<input type="checkbox"/>	=	<input type="checkbox"/>																															
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Name (Print/Type)	Laura R. Grunzinger	Registration No. (Attorney/Agent)	47,616																																													
Signature		Telephone	(513) 627-4597																																													
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+ This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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**SEP 4 - 2007**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application No. : 09/909,288  
Inventor(s) : Peter Robert Foley et al.  
Filed : 7/19/2001  
Art Unit : 1751  
Examiner : G.R. Delcotto  
Docket No. : CM2506  
Confirmation No. : 2173  
Customer No. : 27752  
Title : Cleaning Composition

**APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on May 3, 2007. Please note September 3, 2007 falls on a national holiday.

A timely Notice of Appeal was filed on August 3, 2007.

**REAL PARTY IN INTEREST**

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

**RELATED APPEALS AND INTERFERENCES**

There are no known related appeals, interferences, or judicial proceedings.

**STATUS OF CLAIMS**

Claims 1-29, 35-56, 59-62 and 64-66 are cancelled. Claims 30-35 are withdrawn. Claims 57, 58 and 63 are rejected.

Claims 57, 58 and 63 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

**STATUS OF AMENDMENTS**

09/06/2007 HDESTA1 00000009 162480 09909288

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Appl. No. 09/909,288  
Docket No. CM2506  
Appeal Brief dated September 4, 2007  
Reply to Office Action mailed on May 3, 2007  
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No amendment was filed.

#### SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter of the present application relates to a hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser (page 24, lines 5-13), wherein spray droplets from the spray dispenser have an average equivalent geometric diameter from about 3  $\mu\text{m}$  to about 10  $\mu\text{m}$ , as measured using a TSI Aerosizer (page 15, lines 6-9; page 24, lines 5-13); wherein the cleaning composition comprises an anionic surfactant (page 5, lines 20-25; page 27, lines 3-7), an organic solvent system (page 12, line 24 – page 13, line 1; page 15, line 16 – page 16, line 17), a thickening system (page 3, line 22 – page 4, line 8) comprising a xanthan gum and a synthetic clay thickening agent (page 3, line 22 – page 4, line 8) having an average platelet size of maximum dimension less than about 100 nm (page 14, lines 23-25) and a layer structure (page 46, line 19-21) which in dispersion in water, is in the form of disc-shaped crystals of about 1 nm thick and about 25 nm diameter (page 14, lines 25-27), wherein the organic solvent system comprises at least one organoamine (page 15, lines 19-26) and a glycol ether solvent (page 15, line 28 – page 16, line 8), wherein the glycol ether solvent is selected from the group consisting of ethylene glycol monobutyl ether, diethylene glycol monobutyl ether, ethylene glycol monomethyl ether, ethylene glycol monoethyl ether, diethylene glycol monomethyl ether, diethylene glycol monoethyl ether, propylene glycol monobutyl ether, dipropylene glycol monobutyl ether, ethylene glycol phenyl ether, and mixtures thereof (page 15, line 28 – page 16, line 8); a solvent odor masking perfume (page 17, lines 19 – 26) comprising an ionone (page 17, lines 26-27); wherein the composition has a pH, as measured in a 10% solution in distilled water, from about 11.5 to about 14 (page 4, lines 24-26); and wherein said composition has shear thinning properties (page 13, lines 7-23).

58. The product according to Claim 57, wherein the thickening system (page 3, line 22 – page 4, line 8) further comprises a viscoelastic, thixotropic thickening agent (page 14, lines 6-15).

63. The product according to Claim 57, wherein the glycol ether solvent (page 15, line 28 – page 16, line 8) is a mixture of diethylene glycol monobutyl ether and propylene glycol butyl ether (page 15, line 28 – page 16, line 8).

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GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 57 and 58 are rejected under §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.) and US 6,194,362 (Trihn et al.).

Whether Claims 57, 58 and 63 are unpatentable under 35 U.S.C. §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.) and US 6,194,362 (Trihn et al.) when

- (1) JP 60-141800 is combined with US 5,202,050 (Culshaw et al.) under the rational of Culshaw et al. teaching the equivalence of smectite clays to xantham gum when Culshaw et al. recites the components in a Markush group; and
- (2) whether the five cited references meet the definition of analogous art.

Claims 57, 58 and 63 are rejected under §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.); US 6,194,362 (Trihn et al.) and further in view of WO 99/24539.

Whether Claims 57, 58 and 63 are unpatentable under 35 U.S.C. §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.); US 6,194,362 (Trihn et al.) and WO 99/24539 when:

- (1) JP 60-141800 is combined with US 5,202,050 (Culshaw et al.) under the rational of Culshaw et al. teaching the equivalence of smectite clays to xantham gum when Culshaw et al. recites the components in a Markush group;
- (2) when JP 60-141800 is combined with WO 99/24539 under the rational of WO 99/24539 teaching the equivalence of propylene glycol butyl ether to diethylene glycol monobutyl ether when WO 99/24539 recites the components in a Markush group; and
- (3) whether the six cited references meet the definition of analogous art.

ARGUMENTS

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Claims 57 and 58 are rejected under §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.) and US 6,194,362 (Trihn et al.).

(A) Does The Recitation Of Components In A Markush Group Of A Cited Reference Create A Presumption That The Components Are Equivalents?

The Office Action of May 3, 2007 (hereinafter "Office Action") notes that JP 60-141800 does not specifically teach a synthetic laponite clay having a particle size of less than 100 nm, xanthan gum and an odor masking perfume comprising an ionone, specific physical parameters for the composition and other requisite components of the claimed composition.

The Office Action then states that xanthan gum in the composition of JP 60-141800 would have been obvious as Culshaw et al. teaches the equivalence of smectite clays to xanthan gum in a "similar cleaning composition" and as JP 60-141800 teaches the use of thickening agents such as swellable clay minerals including smectite-type clay minerals. The Office Action further states that Culshaw et al. is a secondary reference which teaches the equivalence of clay thickeners to gum thickeners in a similar composition as JP 60-141800. The Office Action further asserts that one of skill in the art would have "clearly" been motivated to use xanthan gum in JP 60-141800 citing MPEP 2144.06 (In re Kerkoven).

The Office Action supports its logic by stating:

"in the cleaning and detergent field, the listing of several components in a Markush group useful in the composition as thickeners or solvents, for example, does create a presumption that these materials are equivalent thickening or solvent materials. Further, \* \* \* one of ordinary skill in the art looking at such a reference would recognize that these materials are equivalents for their disclosed intended use within such a composition; it is not necessary that the prior specifically state that these materials are equivalents and \* \* \* the equivalency is implicit since the materials are all listed together as surfactants, solvents, thickeners, builders, etc."

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citing In re Fout, 675 F.2d 297, 213 USPQ 532 (CCPA 1982); MPEP §2144.06.

Applicants submit neither the MPEP or case law create an presumption that the listing of several components in a Markush group are *per se* equivalent for purposes of a rejection under 35 U.S.C. §103(a).

"What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case \* \* \* An important factor is whether persons reasonable skilled in the art would have known of the interchangeability of the ingredient not contained in the patent with one that was." In re Ruff, 256 F.2d 590, 598; 118 USPQ 340 (CCPA 1958) (quoting Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 339 U.S. 605 (1950)). It is no longer possible to indulge in a presumption that the members of a Markush group are recognized by anyone to be equivalents, except in regard to the property which confers the shared function specific to the Markush group. In re Ruff, 256 F.2d at 599.

Applicants submit §2144.06 clearly states "in order to rely on equivalence as a rationale supporting an obviousness rejection the equivalency must be recognized in the art, and cannot be based on applicant's disclosure or the mere fact that the components at issue are functional or mechanical equivalents (emphasis added). In re Ruff, 256 F.2d 590, 118 USPQ 340 (CCPA 1958).

When discussing what the meaning of "recognized in the art" means, one can look to decisions such as In re Karl Hermann Hacklander, 328 F.2d 937, 140 U.S.P.Q. 588 (1964), where the court indicated that the prior art as issue, "discloses that polyurethane may be an effective substitute for rubber in many applications." See also US 2,625,535, Col. 2, lines 27-41. Also In re Dillion, 919 F.2d 688, 16 U.S.P.Q.2D 1897 (1990) also touched on this subject stating, "there is a sufficiently close relationship between the tri-orthoesters and tetra-orthoesters (see [US 3,903,006 and US 2,840,613]) in the fuel oil art to create an expectation that the hydrocarbon fuel composition containing the tetra-esters would have similar properties, including water scavenging, to make like compositions containing the tri-esters, and to provide the motivation to make such new compositions. [US 2,840,613] teaches use of both tri- and tetra-orthoesters in a similar type of chemical reaction. [US 3,903,006] teaches their equivalence for a particular practical use.

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Applicants submit that the court in either In Re Hacklander or In re Dillion did not intend for a presumption of equivalence to be created merely by a recitation in a Markush group. Applicants submit that the proper interpretation of these decisions is that more discussion or "teaching" in the reference must be present for the equivalency to be established, let alone for a presumption to be created. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." KSR Int'l Co. v. Teleflex Inc., 550 U.S. \_\_\_\_, 14 (2007) (quoting In re Kahn, 442 F.3d at 988, 78 U.S.P.Q.2d at 1336 (Fed. Cir. 2006)).

In re Fout, cited in the Office Action, addresses a Jepson style claim with the question of whether a process of regenerating fatty material by evaporative distillation would have been obvious in view of a cited reference teaching a process by aqueous extraction for recovery of caffeine from vegetable matter, such as coffee or tea. 675 F.2d at 289-299. The Court discusses a cited reference (Waterman et al.) as teaching suspension of solid material in vegetable oil (fatty material) and then subjecting the material to evaporative distillation to recover solid alkaloids, such as caffeine. *Id.* The preamble of the Jepson-style claim was based upon a second reference (Pagliaro et al.), which was then combined with the Waterman et al. reference to arrive at a determination of obviousness. 675 F.2d at 299-300. Neither reference discussed recited language in Markush group language for the process claim at issue in In re Fout.

Applicants submit that In re Fout is cited incorrectly for the proposition that a recitation of Markush language creates a presumption of equivalence for Markush group compounds.

As such, Applicants submit that the combination of JP 60-141800 in view of Culshaw et al. does not establish a *prima facie* case of obviousness against Claims 57 and 58 and the rejection under §103(a) should be withdrawn. Claim 63 depends upon Claim 57 and therefore does not have a *prima facie* case of obviousness established against it under §103(a) and any such rejection should also be withdrawn.

(B) Whether The Five References Combined Do Meet The Definition Of Analogous Art Under §2141.01(A) In The Chemical Arts?



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"In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). The Office Action has stated that the references are all drawn to the same field of endeavor and are analogous prior art.

The Office Action does not directly address the scope of what was considered to be the field of applicant's endeavor. As such, Applicants submit that the scope of field of the endeavor is for a hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser. The particular problem with which the applicants are concerned is a sprayable composition having a good spray characteristic, such a composition should be in the form of a low viscosity fluid with a viscosity sufficiently high in order to maintain a substantial concentration of cleaning composition on vertical or inclined surfaces for a time long enough to allow soil swelling to take place and to enable the product to work.

JP 60-141800 relates to a liquid detergent composition appropriate for organic materials adhered to household stoves, ovens used in cooking, vents, plywood, glass, refrigerators and other kitchen items, and in particular for tough stains resulting from thermal and oxidative modification of oils. (see page 3 of translation previously provided).

Culshaw et al. discusses that "[t]he benefits of the present compositions are derived from the combination of the specific organic chelating agents and organic solvents described hereinabove. They are particularly noticeable in terms of calcium soap-soil removal from surfaces such as bathtub surfaces." (emphasis added). Col. 5, lines 30-35.

JP 8151597 relates to obtaining a liquid detergent composition, having a favorable viscosity and good liquidity without causing the stringiness, etc., in taking out thereof from a container in use by blending a clay mineral having specific properties therein.

Weibel et al. relates to hard surface scouring cleansers containing hypochlorite bleach which are thickened with a polyacrylate resin or a combination of a synthetic smectite clay and a polyacrylate resin and which contain "soft" organic abrasive particles. More particularly, it relates to such compositions containing particulate abrasives which

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maintain high active chlorine stability over a long period of time and have good rinsability. (emphasis added)

Trihn et al. relates to a glass cleaning composition delivering blooming perfumes which deliver a high level of consumer recognition immediately upon use. (emphasis added)

The Office Action identified several features in the claims to which the main reference JP 60-141800 does not address. Various elements not taught or suggested by JP 60-141800 are then attempted to be addressed by various permutations of the remaining four references. Applicants submit that, at minimum, Weibel et al. fails to be related to Applicants field of endeavor (a hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser) and also fail to address the particular problem with which the Applicants are concerned.

As such, at minimum, Weibel et al. is non-analogous art and should be withdrawn from consideration. In such an event, a *prima facie* case has not been established and the rejection under §103(a) should be withdrawn.

Claims 57, 58 and 63 are rejected under §103(a) over JP 60-141800 in view of US 5,202,050 (Culshaw et al.), JP 8151597, US 5,821,214 (Weibel et al.); US 6,194,362 (Trihn et al.) and further in view of WO 99/24539.

(A) Does The Recitation Of Components In A Markush Group Of A Cited Reference Create A Presumption That The Components Are Equivalents?

The Office Action of May 3, 2007 (hereinafter "Office Action") notes that JP 60-141800 does not specifically teach a synthetic lapointite clay having a particle size of less than 100 nm, xanthan gum and an odor masking perfume comprising an ionone, specific physical parameters for the composition and other requisite components of the claimed composition. The Office Action further states that JP 60-141800 does not teach the use of propylene glycol butyl ether as recited in Claim 63.

The Office Action then states that xanthan gum in the composition of JP 60-141800 would have been obvious as Culshaw et al. teaches the equivalence of smectite clays to xanthan gum in a "similar cleaning composition" and as JP 60-141800 teaches the use of

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thickening agents such as swellable clay minerals including smectite-type clay minerals. The Office Action further states that Culshaw et al. is a secondary reference which teaches the equivalence of clay thickeners to gum thickeners in a similar composition as JP 60-141800. The Office Action further asserts that one of skill in the art would have "clearly" been motivated to use xanthan gum in JP 60-141800 citing MPEP 2144.06 (In re Kerkoven).

The Office Action further states that the use of propylene glycol butyl ether in JP 60-141800 would have been obvious because WO 99/24539 teaches the equivalence of propylene glycol butyl ether to diethylene glycol monobutyl ether in a "similar cleaning composition".

The Office Action supports its logic by stating:

"in the cleaning and detergent field, the listing of several components in a Markush group useful in the composition as thickeners or solvents, for example, does create a presumption that these materials are equivalent thickening or solvent materials. Further, \* \* \* one of ordinary skill in the art looking at such a reference would recognize that these materials are equivalents for their disclosed intended use within such a composition; it is not necessary that the prior specifically state that these materials are equivalents and \* \* \* the equivalency is implicit since the materials are all listed together as surfactants, solvents, thickeners, builders, etc."

citing In re Fout, 675 F.2d 297, 213 USPQ 532 (CCPA 1982); MPEP §2144.06.

Applicants submit neither the MPEP or case law create an presumption that the listing of several components in a Markush group are per se equivalent for purposes of a rejection under 35 U.S.C. §103(a).

"What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case \* \* \* An important factor is whether persons reasonable skilled in the art would have known of the interchangeability of the ingredient not contained in the patent with one that was." In re Ruff, 256 F.2d 590, 598; 118 USPQ 340 (CCPA 1958) (quoting Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 339 U.S. 605 (1950)). It is no longer possible to indulge in a presumption that the

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members of a Markush group are recognized by anyone to be equivalents, except in regard to the property which confers the shared function specific to the Markush group. In re Ruff, 256 F.2d at 599.

Applicants submit §2144.06 clearly states "in order to rely on equivalence as a rationale supporting an obviousness rejection the equivalency must be recognized in the art, and cannot be based on applicant's disclosure or the mere fact that the components at issue are functional or mechanical equivalents (emphasis added). In re Ruff, 256 F.2d 590, 118 USPQ 340 (CCPA 1958).

When discussing what the meaning of "recognized in the art" means, one can look to decisions such as In re Karl Hermann Hacklander, 328 F.2d 937, 140 U.S.P.Q. 588 (1964), where the court indicated that the prior art as issue, "discloses that polyurethane may be an effective substitute for rubber in many applications." See also US 2,625,535, Col. 2, lines 27-41. Also In re Dillion, 919 F.2d 688, 16 U.S.P.Q.2D 1897 (1990) also touched on this subject stating, "there is a sufficiently close relationship between the tri-orthoesters and tetra-orthoesters (see [US 3,903,006 and US 2,840,613]) in the fuel oil art to create an expectation that the hydrocarbon fuel composition containing the tetra-esters would have similar properties, including water scavenging, to make like compositions containing the tri-esters, and to provide the motivation to make such new compositions. [US 2,840,613] teaches use of both tri- and tetra-orthoesters in a similar type of chemical reaction. [US 3,903,006] teaches their equivalence for a particular practical use.

Applicants submit that the court in either In Re Hacklander or In re Dillion did not intend for a presumption of equivalence to be created merely by a recitation in a Markush group. Applicants submit that the proper interpretation of these decisions is that more discussion, or "teaching" in the reference must be present for the equivalency to be established, let alone for a presumption to be created. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." KSR Int'l Co. v. Teleflex Inc., 550 U.S. \_\_\_\_, 14 (2007) (quoting In re Kahn, 442 F.3d at 988, 78 U.S.P.Q.2d at 1336 (Fed. Cir. 2006)).

In re Fout, cited in the Office Action, addresses a Jepson style claim with the question of whether a process of regenerating fatty material by evaporative distillation would have

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been obvious in view of a cited reference teaching a process by aqueous extraction for recovery of caffeine from vegetable matter, such as coffee or tea. 675 F.2d at 289-299. The Court discusses a cited reference (Waterman et al.) as teaching suspension of solid material in vegetable oil (fatty material) and then subjecting the material to evaporative distillation to recover solid alkaloids, such as caffeine. *Id.* The preamble of the Jepson-style claim was based upon a second reference (Pagliaro et al.), which was then combined with the Waterman et al. reference to arrive at a determination of obviousness. 675 F.2d at 299-300. Neither reference discussed recited language in Markush group language for the process claim at issue in In re Fout.

Applicants submit that In re Fout is cited incorrectly for the proposition that a recitation of Markush language creates a presumption of equivalence for Markush group compounds.

As such, Applicants submit that the combination of JP 60-141800 in view of Culshaw et al. does not establish a *prima facie* case of obviousness against Claims 57 and 58 and the rejection under §103(a) should be withdrawn. Claim 63 depends upon Claim 57 and therefore does not have a *prima facie* case of obviousness established it under §103(a) and any rejection should also be withdrawn.

(B) Whether The Six References Combined Do Meet The Definition Of Analogous Art Under §2141.01(A) In The Chemical Arts

"In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). The Office Action has stated that the references are all drawn to the same field of endeavor and are analogous prior art.

The Office Action does not directly address the scope of what was considered to be the field of applicant's endeavor. As such, Applicants submit that the scope of field of the endeavor is for a hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser. The particular problem with which the applicants are concerned is a sprayable composition having a good spray characteristic, such a composition should be in the form of a low viscosity fluid with a viscosity sufficiently high in order to maintain

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a substantial concentration of cleaning composition on vertical or inclined surfaces for a time long enough to allow soil swelling to take place and to enable the product to work.

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Trihn et al. relates to a glass cleaning composition delivering blooming perfumes which deliver a high level of consumer recognition immediately upon use. (emphasis added)

WO 99/24539 relates to a method of softening soil deposited on a hard surface especially on tough soils such as burnt milk, caramelized sugars, cooked egg, soils which have hardened with time, etc. This is particularly true in the hand cleaning of tableware and pots and pans. It is not uncommon to have both light soils and heavy or tough soils on a variety of different surfaces, such as fine china plates, copper pots, stainless flatware, wooden spatulas, ceramic mortar and pestles, etc. in hand dish cleaning. (emphasis added)

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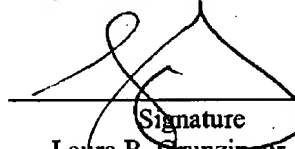
The Office Action identified several features in the claims to which the main reference JP 60-141800 does not address. Various elements not taught or suggested by JP 60-141800 are then attempted to be addressed by various permutations of the remaining four references. Applicants submit that, at minimum, Weibel et al. and WO 99/24539 fail to be related to Applicants field of endeavor (a hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser) and also fail to address the particular problem with which the Applicants are concerned.

As such, at minimum, Weibel et al. and WO 99/24539 are non-analogous art and should be withdrawn from consideration. In such an event, a *prima facie* case has not been established and the rejection under §103(a) should be withdrawn.

#### SUMMARY

In view of all of the above, it is respectfully submitted that .

Respectfully submitted,  
THE PROCTER & GAMBLE COMPANY

  
\_\_\_\_\_  
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#### CLAIMS APPENDIX

57. A hard surface cleaning product comprising a hard surface cleaning composition and a spray dispenser, wherein spray droplets from the spray dispenser have an average equivalent geometric diameter from about 3  $\mu\text{m}$  to about 10  $\mu\text{m}$ , as measured using a TSI Aerosizer; wherein the cleaning composition comprises an anionic surfactant, an organic solvent system, a thickening system comprising a xanthan gum and a synthetic ~~laponite~~ clay thickening agent having an average platelet size of maximum dimension less than about 100 nm and a layer structure which in dispersion in water, is in the form of disc-shaped crystals of about 1 nm thick and about 25 nm diameter, wherein the organic solvent system comprises at least one organoamine and a glycol ether solvent, wherein the glycol ether solvent is selected from the group consisting of ethylene glycol monobutyl ether, diethylene glycol monobutyl ether, ethylene glycol monomethyl ether, ethylene glycol monoethyl ether, diethylene glycol monomethyl ether, diethylene glycol monoethyl ether, propylene glycol monobutyl ether, dipropylene glycol monobutyl ether, ethylene glycol phenyl ether, and mixtures thereof; a solvent odor masking perfume comprising an ionone; wherein the composition has a pH, as measured in a 10% solution in distilled water, from about 11.5 to about 14; and wherein said composition has shear thinning properties.

58. The product according to Claim 57, wherein the thickening system further comprises a viscoelastic, thixotropic thickening agent.

63. The product according to Claim 57, wherein the glycol ether solvent is a mixture of diethylene glycol monobutyl ether and propylene glycol butyl ether.



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#### EVIDENCE APPENDIX

None

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#### RELATED PROCEEDINGS APPENDIX

None